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No. 90-1675

IN THE

Supreme Court of the United States

OCTOBER TERM, 1990

ROBERT REICHELT, CATHERINE PELLETIER, PAUL S. JUZWISHEN, ALLEN A. MICHEWICH, FRANK A. MISIEWICZ, WILLIAM J. MUELLER, JOSEPH M. SCAVONE, LINDA A. SHINGARA, JOHN D. SWEENEY, HENRY W. WAJDOWICZ, and All Class Members,

Petitioners,

VS.

EMHART CORPORATION, USM CORP., and ROYAL E. COWLES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY BRIEF

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TABLE OF CONTENTS

Page

ARGUMENT

1. By Their Silence, Respondents Agree That There Are Serious Conflicts Between The Circuits And A Failure To Follow *Firestone v. Bruch* 1

2. Respondents Have Not Disputed The Irrelevance Of Emhart's Prior Severance Practice in Subsidiaries Other Than Farrel 2

3. There Were No Discretionary Variations In The Unwritten Prior Severance Practice. It Was 100 Percent Uniform 3

4. There Is No Possibility Of A Double Recovery — The SUB Plans Only Mentioned Employees "On Layoff Status" On The Date Of The Sale And Did Not Apply To The Plaintiffs And Others Who Were Actively Employed By Farrel On The Date Of The Sale 3

5. Respondents' Citations In Support Of An Alleged Unfettered Right to Amend Only Involve Claimed Violations Of Fiduciary Duties Imposed By ERISA. Petitioners' Case Is Not Based On Any Such Fiduciary Duty Claim 5

APPENDIX

Appendix A — Excerpts from SUB Plan RB-A1

Appendix B — Excerpts from agreed statement of disputed facts RB-A3

TABLE OF AUTHORITIES

Page

Cases:

Adams v. Avondale Industries, Inc., 905 F.2d 943, *cert. den.*, 111 S.Ct. 517 (1990) 5

Blau v. Del Monte Corp., 748 F.2d 1348 (9th Cir. 1985), *cert. den.*, 477 U.S. 805 (1985) 2

Bruning v. Mrs. Smith's Frozen Food Co., 894 F.2d 401 (4th Cir. 1989) (unpublished) 5

Deming v. American Standard, 905 F.2d 1124 (7th Cir. 1990) 2

Firestone Tire & Rubber Co. v. Bruch, 489 U.S. 101, 109 S.Ct. 948, 103 L.Ed.2d 80 (1989) 3

Kunin v. Benefit Trust Life Ins. Co., 910 F.2d 534 (9th Cir.), *cert. den.*, 111 S.Ct. 581 (1990) 2

Kullins v. Malco, A Microdot Co., Inc., 459 N.E.2d 1038 (Ill. 1985) 2

Veilleux v. Atochem N.A. Inc., 729 F.2d 74 (2nd Cir. 1991) 2

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PETITIONERS' REPLY BRIEF

1. By Their Silence, Respondents Agree That There Are Serious Conflicts Between The Circuits And A Failure To Follow *Firestone v. Bruch.*

Respondents devote only one page (p. 16) of their seventeen page brief to the main thrust of the petition; and most of that one

page is devoted to attacking the competence and brief writing ability of the petitioners' attorney under Supreme Court Rule 14.5 and totally fails to answer on the merits any of the petitioners' arguments as to why certiorari should be granted[1].

Respondents don't answer, discuss or even mention petitioners' most significant cases: *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534 (9th Cir. 1990), *cert. den.*, 111 S.Ct. 581 (1990); *Deming v. American Standard*, 905 F.2d 1124 (7th Cir. 1990); *Blau v. Del Monte Corp.*, 748 F.2d 1348 (9th Cir. 1985), *cert. den.*, 477 U.S. 805 (1985); and *Kullins v. Malco, A Microdot Co., Inc.*, 459 N.E.2d 1038 (Ill. 1984).

2. Respondents Have Not Disputed The Irrelevance of Emhart's Prior Severance Practice in Subsidiaries Other Than Farrel.

In their brief respondents continue to point out that Emhart's prior practice in its other divisions and subsidiaries was not to pay severance in the sale of assets divestiture situation despite the fact that (1) in the District Court the respondents agreed that the Farrel employees, including petitioners, were totally unaware of any such practice and did not rely upon it (A-38 and 39), and (2) nowhere in their brief do they dispute the petitioners statements in their petition (pp. 5-6) which show the irrelevance of these practices and also show the irrelevance of the fact that no severance was paid in the prior acquisitions of Farrel's stock by USM and USM's stock by Emhart (where, as in *Vielleux v. Atochem of N.A.*, 929 F.2d 74 (2nd Cir. 1991), the purchaser

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[1] For example, respondents' only response to the preemption issue is to misleadingly misstate Petitioners' position by saying that it would subject ERISA benefits "to the vagaries of a state-by-state application of common law contract interpretation." Respondents know perfectly well that petitioners are urging that state court decisions be used only as a source or guide in the development of a *uniform* national common law of contracts.

continued to be liable for the past service credits earned by the employees' years of service prior to the acquisition).

3. There Were No Discretionary Variations In The Unwritten Prior Severance Practice. It Was 100 Percent Uniform.

On page 4 of their brief respondents reiterate the error of their original summary judgment brief which was erroneously picked up by the District Court (A-17) and the Second Circuit (A-5), namely that there was some (discretionary) variation in the amount of severance paid in ten of the twenty-nine involuntary terminations not for cause which occurred between 1981 and May 1986. In fact, the absolutely undisputed evidence before both courts (pages RB-A3 and 4 in the attached Appendix) was (1) that there were only twenty-five such terminations (p. 5 of the petition inaccurately says "twenty-four"), (2) that severance was paid each time and (3) that the amount of each payment was computed on an identical basis (two weeks' pay for each year of service forregular employees, more for managerial employees).

This 100 percent uniformity of practice with respect to both eligibility and amount is strong circumstantial evidence that the plan administrator did not in fact have any discretionary authority as defined in *Firestone Tire & Rubber Co. v. Bruch*, 109 S. Ct. at 954.

4. There Is No Possibility Of A Double Recovery - The SUB Plans Only Mentioned Employees "On Layoff Status" On The Date Of The Sale And Did Not Apply To The Plaintiffs And Others Who Were Actively Employed By Farrel On The Date Of The Sale.

The SUB plans have all the proper boiler plate including: a "Purpose" clause; an "Eligibility" clause defining who is a "covered" employee; a description of the benefits provided by

the plan (i.e. "supplemental unemployment benefits consisting of one week's pay per year of employment"); a "Limitations" clause (which specifies which of the otherwise "covered" employees may not receive the "supplemental unemployment benefits" provided by the plan). (These clauses are printed on pages RB-A1 and 2 of the Appendix to this Reply Brief).

The SUB plans contain no reference whatsoever to people like the plaintiffs who were actively employed on the day of sale. The SUB plans refer exclusively to people "on layoff". The "Purpose" clause and "Eligibility" clauses refer only to persons "laid off in a reduction in force in 1986", to persons who were "laid off after February 6, 1986 and prior to the date of sale, and who remain on layoff status on the date the Roll [or Machine] Shop is sold". (on that date there actually were some other employees who were on "layoff".) None of the plaintiffs were "laid off" or on"layoff status" on the date of sale. On the contrary, they were actively employed on the date of sale (the phrase "actively employed" is used elsewhere in the plan, so it is clear that the plan makes a distinction between "actively employed" and just plain "employed").

"Laid off" is a term of art not to be confused with "terminated". In the evidence before the Second Circuit, it was undisputed that this terminology meant laid off with a seniority right of recall for three years. It was likewise undisputed in the evidence before the Second Circuit that the prior practice under the unwritten plan was to give severance pay to employees when they were "terminated" but not when they were "laid off".

Hence, all the SUB plans did was to provide a limited benefit for employees on "lay off status" who were not entitled to severance pay under the unwritten plan. The SUB plans had nothing whatsoever to do with the plaintiffs.

Therefore, respondents misread the SUB plans when they say on paragraph 14 of their brief that the "petitioners were covered

by the express terms of the plans." The Second Circuit made a more grievous error in its zeal to reach a similar conclusion. It actually misquoted paragraph 2 of the plans' "Eligibility" clause to include "employees employed by USM on the date of sale and employed by SHW after the date of sale" (All); whereas in the actual document the word "employees" is qualified by the words "Any covered" so that the document (RB-A1) refers to, "Any *covered* Roll shop employee and employed by SHW after the date of sale.". In paragraph 1 of the "Eligibility" clause, "covered" employees are limited to people on "layoff status on the date of sale". Consequently since the plaintiffs were not on "layoff status", nothing in the SUB plans has any application to them. They were not entitled to anything under the "Eligibility" clause so there was nothing which could be taken away from them by the "Limitations" clause.

5. Respondents' Citations In Support Of An Alleged Unfettered Right To Amend Only Involve Claimed Violations Of Fiduciary Duties Imposed By ERISA. Petitioners' Case Is Not Based On Any Such Fiduciary Duty Claim.

Despite all respondents' verbiage on the issue of the right to amend (pp. 9-14 of respondents' brief) and despite their citation of decisions tainted by the arbitrary and capricious standard of review,[2] respondents' brief fails to answer or even discuss page 23 of the petition which distinguishes decisions such as *Adams v. Avondale Industries, Inc.*, 905 F.2d 943 (6th Cir.), *cert. den.*, 111 S. Ct. 517 (1990) on the grounds that they only deal with a

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[2] The respondents also cite the *unpublished* decision in *Bruning v. Mrs. Smith Frozen Food Co.*, 894 F.2d 401 (4th Cir. 1989). It is a horrendous example of a court pretending to apply the new *de novo* standard of review while actually giving deference to the plan administrator's decision (finding the employer's denial of benefits was clearly "justifiable").

claimed breach of fiduciary duty -- an issue which is not even raised in this petition.

Respectfully submitted,

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APPENDIX

APPENDIX A

(Excerpts from Pages A 25 and A 26 of the Parties' Joint Appendix, Court of Appeals)

USM SUPPLEMENTAL UNEMPLOYMENT BENEFIT PLAN FOR FARREL DIVISION ROLL SHOP AND FOUNDRY SALARIED EMPLOYEES

The purpose of this Plan is to provide supplemental unemployment benefits to covered Farrel Division Roll Shop and Foundry salaried employees involuntarily unemployed as a result of the closing of the Farrel Division foundry or laid off in a reduction in force during 1986.

Eligibility

1. The Plan covers all active Roll Shop and Foundry salaried employees of the Farrel Division of USM Corporation in Ansonia, Connecticut ("USM") who (a) are permanently laid off after February 1, 1986 and prior to the date of sale, and who remain on layoff status on the date the Roll Shop is sold, or (b) are unemployed by USM on account of the closing of the Foundry operations, and who are not offered employment on the sale of the Roll Shop by Farrel Corporation, provided (c) they release USM from all claims arising out of their layoff or unemployment.

2. Any covered Roll Shop employee employed by USM on the date of sale and employed by SHW Incorporated after the date of sale of the Roll Shop, will also be eligible to receive supplemental unemployment benefits if he is permanently laid off by SHW Incorporated during 1986,

provided he release USM from all claims arising out of his employment relationship with USM.

3. The gross amount of supplemental unemployment benefit payments to be made to a covered employee will be determined according to the following formula:

> One week's base pay for each full year of continuous service with USM, reduced by an notification pay

Limitations

Only salaried Roll Shop and Foundry employees who were actively employed at time of layoff are eligible. Any Roll Shop or Foundry employee who has quit, retired or been discharged for misconduct is not eligible, nor is a Roll Shop or Foundry employee in receipt of disability benefits unless he is medically able to return to work by the end of 1986 and is not offered a job with SHW Incorporated. Except as set forth in Paragraph 2, "Eligibility", any employee who accepts a job with SHW Incorporated is also not eligible for supplemental unemployment benefits. Any employee who does not accept an offer of a job with SHW Incorporated is also not eligible for supplemental unemployment benefits.

Effective Date

The Plan takes effect on February 1, 1986.

APPENDIX B

(Excerpts from Pages A 100 and A101 of the parties' Joint Appendix, Court of Appeals)

(The following statement of undisputed facts was filed with the plaintiffs' motion for summary judgment in the District Court and these excerpts were "deemed to be admitted" pursuant to Local Rule 9(c)(1) because they were not controverted by the defendants' Local Rule 9(c)(2) counter-statement)

UNITED STATES DISTRICT COURT
DISTRICT OF CONNECTICUT

Consolidated Master Docket
Number N-86-510 (AHN)

IN RE EMHART CORPORATION

All Cases

PLAINTIFFS' STATEMENT OF MATERIAL FACTS
ABOUT WHICH THERE IS NO
GENUINE ISSUE TO BE TRIED
(Local Rule 9(c)(1))

1. ...

27. Between December 17, 1981 and May 2, 1986, while there was no written plan, twenty-nine salaried employees were terminated involuntarily and not for cause (Defendants' supplemental response to plaintiffs' interrogatories, Fourth Set, interrog. No. 1, Appendix V). Twenty-five of these all received severance pay of at least one week for each year of

service (Defendants' response to interrog. No. 2 of the Plaintiffs' Fourth Set, Appendix V; document 1002 in Appendix F; and the affidavit of Donald Watt in Appendix T).

28. Of the four who don't appear to have received full severance, three clearly weren't eligible and don't belong on the list. Saddler was "laid off" and not "terminated" (document 10046, Appendix M). Jaske was also "laid off" (Jaske affidavit, Appendix T.2). Morris resigned and therefore was a voluntary termination, not an involuntary one (document 10045, Appendix L).

29. The last one, Shaffer, wasn't eligible either. He was in Houston, Texas, not Ansonia. There was dissatisfaction with his performance and he either resigned or was discharged for cause.

30. Six out of the twenty-nine received more than one week's pay for each year, but all of them (including Ken Irish) were at a "director" or executive pay level where larger benefits were part of the standard practice (Irish depo., pp. 104-106).

31. During the years since 1981 Irish was the only or principal person from Farrel who requested and obtained Roy Cowles' approval for severance payments. Irish testified that Cowles always approved his requests for one week pay for each year of service after Irish explained "about why the employee was being let go" (Irish depo. p 32).